No. 89-1160

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MICHIGAN,-MICHIGAN PUBLIC SERVICE COMMISSION, WILLIAM E. LONG and EDWYNA ANDERSON,
Petitioners,

v.

PANHANDLE EASTERN PIPE LINE COMPANY and NATIONAL STEEL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT NATIONAL STEEL CORPORATION IN OPPOSITION

RICHARD M. ZOMNIR
BABST, CALLAND, CLEMENTS AND ZOMNIR
2 Gateway Center
8th Floor East Wing
Pittsburgh, PA 15222
(412) 394-5400

WILLIAM PENNIMAN
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2404
(202) 383-0100

DOUGLAS H. WEST
(Counsel of Record)
JEAN G. SCHTOKAL
HILL LEWIS
100 Renaissance Center
32nd Floor
Detroit, MI 48243
(313) 259-3232
Attorneys for Respondent National Steel Corporation

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QUESTION PRESENTED

Whether a Michigan statute, applied to regulate an interstate pipeline's FERC-approved transportation of natural gas in interstate commerce, and the facilities for the delivery thereof to the consumer-owner of the gas, is preempted by the Natural Gas Act, 15 U.S.C. §§ 717, *et seq.*

IDENTITY OF AFFILIATES

National Steel Corporation is a Delaware Corporation. It is jointly owned by two parent entities, NII Capital Corporation and NKK U.S.A. Corporation. These corporations are not publicly traded but are subsidiaries of the publicly traded corporations, National Intergroup, Inc. and NKK Corporation. National Steel Corporation has the following subsidiaries owned jointly with others, none of which is publicly traded:

Buffalo River Improvement Corporation
Concast Holding A.G.
Iron Ore Company of Canada
Iron Ore Land Company
Mathies Coal Company
The Messaba-Cliffs Mining Company
Pilot Knob Pellet Company
Presque Isle Corporation
ProCoil Corporation
Taylor Devices, Inc.

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BRIEF OF RESPONDENT NATIONAL STEEL CORPORATION IN OPPOSITION

SUMMARY OF ARGUMENT

This case is not sufficiently important to warrant review by this Court. FERC decisions almost always have an impact on rates and rate designs of local utilities regulated by the state, and the fact that such is the case here does not warrant this Court's attention. Moreover, as this Court has recently stated in *Northwest Central Pipeline*, *infra*, one agency's exercise of authority granted under the NGA will not be thwarted merely because such exercise may have an effect on rates established by another agency. In addition, there is no conflict among the circuits involving any of the issues in this case.

The decision below is entirely consistent with the scheme of federal regulation under the NGA. The transaction in question, which is the transportation by Panhandle of National's own gas which it purchases in Oklahoma and delivers to Panhandle for redelivery at National's plant in Michigan, is clearly the "transportation of natural gas in interstate commerce" subject to exclusive FERC jurisdiction. Michigan's arguments that the transaction constitutes "local distribution" of gas, reserved by the NGA for state regulation, are unsupported by the legislative history of the NGA, by caselaw, or by reasoned analysis. The legislative history of the NGA, which has been cited in several decisions of this Court, clearly establishes that "local distribution" means *only* the retail sale of gas. Here, Panhandle is *not* making a sale. The pre-NGA cases cited by Michigan are not relevant to the issue of the scope of state authority under the NGA because Congress itself intended, by the precise language used in the NGA, to draw a "bright line" between federal/state jurisdiction. The language of the statute speaks for itself. Numerous decisions of this Court interpreting the NGA have established that Congress' grant to FERC of jurisdiction over the transportation of natural gas in interstate commerce is all-encompassing, and support the conclusion of the court below that:

> "It is hardly conceivable that a transaction could fit more neatly into the category of 'transportation of natural gas in interstate commerce'."

Michigan's heavy reliance on *Panhandle/Michigan, infra*, is in error. Indeed, any comparison of the situation here to that in *Panhandle/Michigan* is spurious. The *Panhandle/Michigan* case involved the retail *sale* of gas clearly subject to rate regulation by the state because it constituted "local distribution". *Panhandle/Michigan* was not a preemption case, it was a burden on commerce case involving whether the state could prohibit the retail sale of gas in interstate commerce by impos-

ing *certificate* jurisdiction. Here, there is no local sale taking place over which Michigan can impose certificate jurisdiction. Finally, this case is distinguishable from *Panhandle/Michigan* in that there, Panhandle was attempting to avoid all regulation, where as here the transaction has been subjected to close regulatory scrutiny by the FERC.

Having found that the transaction in question constituted the interstate transportation of gas subject to FERC jurisdiction, the Court below also correctly concluded that exercise of jurisdiction by Michigan over the same transaction was preempted under the authority of *Schneidewind v. ANR Pipeline, infra.* Michigan's argument that Congress did not intend preemption to occur in a case of this nature rests on its fundamentally erroneous assertion that the transaction in question constitutes "local distribution".

Finally, Michigan's reliance on this Court's recent decision in *Northwest Central Pipeline* is misplaced because in that case the state was found to be acting within an area expressly reserved to it under the NGA, whereas here Michigan is attempting to regulate the transportation of gas in interstate commerce; an area expressly and exclusively reserved to the FERC by Congress.

STATEMENT OF THE CASE

Respondent National Steel Corporation ("National") will not unnecessarily repeat the description of the proceedings below or the basic facts relating to this controversy which are contained in the Statement of the Case in the Petition of the Michigan Public Service Commission and the State of Michigan ("Michigan"). National will, however, expand upon and clarify some of the facts.

MichCon has not sold any gas to National since early 1986, when National commenced purchasing its gas di-

rectly from producers in states such as Oklahoma and Louisiana.[1] Since then, National has been contracting with interstate pipelines to transport its gas roughly 1,000 miles from the producing states into Michigan where, until recently, possession of the gas was turned over to the local utility, MichCon, for National's account. MichCon would then transport National's gas about 5 miles and redeliver the gas to National for a charge of about $.78 per thousand cubic feet, or approximately $10 million per year.

As the Federal Energy Regulatory Commission ("FERC") found in its hearings on Panhandle's application to provide direct service to National, "National Steel is in a struggle to survive and to do so it is reasonable for it to take every measure that it can to reduce its costs."[2] One such effort which National took was to request Panhandle to deliver gas owned by National directly from the producing state to its steel plant in Michigan. After vigorous pursuit by National, Panhandle finally sought and received from the FERC a certificate of public convenience under § 7(c) of the National Gas Act ("NGA"), 15 U.S.C. § 717b(c), to transport National's gas directly to it, and to construct the facilities necessary to effect delivery of the gas. Under the transaction certificated by the FERC,[3] Panhandle will receive National's gas in Oklahoma, transport it approximately 1,000 miles through several states into Michigan, and redeliver National's gas to its steel mill near Detroit for

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[1] National's ability to purchase gas directly from producers in other states free from regulation by Michigan is not an issue in controversy.

[2] *Panhandle Eastern Pipe Line Co.*, 38 FERC (CCH) ¶ 63,009 (1987) at pg. 65,043, affirmed 40 FERC (CCH) ¶ 61,220 (1987), *aff'd*, 883 F.2d 117 (D.C. Cir. 1989).

[3] The FERC's regulation of the transaction includes the services of reeeipt, transportation and redelivery, as well as the facilities to provide such service.

a charge of about $.41 per thousand cubic feet. A portion of Panhandle's pipeline happens to run directly across National's steel plant property. Consequently, National will be able to receive the gas from Panhandle within its existing plant boundary, without the necessity of constructing additional pipeline facilities through the streets and alleys of the Detroit area. Another critical fact which cannot be emphasized too strongly is that *National will not purchase any gas from Panhandle.* National will purchase gas from a producer in Oklahoma prior to delivery of that gas to Panhandle for redelivery following interstate transportation directly to National's plant in Michigan.

In its Statement of the Case, Michigan refers to the Opinion of the D.C. Circuit in the case involving the appeal of the FERC's Order which granted the certificate of public convenience and necessity for direct delivery of gas by Panhandle to National.[4] Michigan notes that the D.C. Circuit held that FERC had jurisdiction to issue such an Order because the Panhandle/National transaction involves "transportation of natural gas in interstate commerce"; an activity expressly subject to federal regulation under the NGA. Michigan then complains that the Sixth Circuit merely incorporated the D.C. Circuit's holding and proceeded to find that the Michigan statute was preempted "without any analysis" of Michigan's argument that the NGA reserved to Michigan authority over the "local distribution" of gas within the meaning of the NGA, thus precluding a finding that there was a conflict between federal and state authority. This assertion is absolutely incorrect, as is apparent from the face of the Sixth Circuit's Opinion which correctly framed the issue and adopted the analyses of the issue by both the D.C. Circuit and the District Court below. (Appen-

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[4] *Michigan Consolidated Gas Co. v. Federal Energy Regulatory Comm.*, 883 F.2d 117 (D.C. Cir. 1989), *petition for cert. pending sub nom. State of Michigan v. FERC*, No. 89-1161.

dix, 8a-9a). This point will be discussed in greater detail at page 16 of this brief.

Also, Michigan's Statement of the Case contains extensive argument regarding the applicability of *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm.*, 341 U.S. 329, 95 L. Ed. 993, 71 S. Ct. 777 (1951), ("Panhandle/Michigan") to this case. That subject will be dealt with as a separate issue at page 18 of this brief.

REASONS FOR DENYING THE WRIT

I. THE QUESTION OF LAW PRESENTED IN THIS CASE IS NOT SUFFICIENTLY IMPORTANT TO WARRANT REVIEW BY THIS COURT.

Michigan argues that this case presents an important question of federal law which should be settled by this Court. The federal law question is whether Panhandle's direct delivery to National of National's own gas, which it purchases in another state and has transported on Panhandle's pipeline in interstate commerce to the point of redelivery, constitutes "local distribution" under § 1 (b) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717 (b). It is an important question, Michigan maintains, because ". . . rates and rate designs adopted by state utility commissions for the general ratepaying public will be profoundly affected if FERC is allowed to authorize interstate pipelines to serve large industrial consumers . . . ." Petition, page 7. The fallacy of this argument is its assumption that if the federal legal question arises in the context of a FERC decision affecting rates and rate designs adopted by a state regulatory authority, then the decision relating to such question is necessarily worthy of this Court's review. Were that the situation, this Court could dedicate a major portion of its docket just to cases involving decisions of the FERC; for rarely does a FERC decision *not* have a significant, frequently profound, effect on rates and rate designs of local utilities

which purchase gas and receive transportation services from interstate pipelines.

Also, the merits of Michigan's argument, if successful, would establish a rule of reverse preemption; if a FERC decision would have an effect on rates and rate designs which are the subject of state regulation, the FERC is powerless to act. There is, however, no basis for the proposition that, absent express Congressional intent, *federal* interests must fall when they conflict with *state* interests. In addition, the notion that preemption will result when one agency's properly exercise authority has a mere effect on rates established by another has recently been rejected by this Court. In *Northwest Central Pipeline Corp. v. State Corp. Comm. of Kansas*, —— U.S. ——, 103 L. Ed. 2d 509, 109 S. Ct. 1262 (1989), Kansas issued regulations directed at producers, which Kansas asserted was within its jurisdiction by reason of NGA § 1(b) which reserves to the states authority to regulate the "production and gathering of natural gas".[5] Certain pipelines asserted that the Kansas regulation was preempted because it might affect their gas purchase costs and hence their interstate rates which are subject to FERC regulation. This Court rejected that theory, holding:

> "It would be strange indeed to hold that Congress intended to allow the States to take measures to prorate production and set allowab'es in furtherance of legitimate conservation goals and in order to protect property rights, but that—because enforcement might have some effect on interstate rates—it did not intend that the States be able to enforce these measures by encouraging actual production of allowables." 103 L. Ed. 2d at 529.

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[5] The reservation clause in NGA § 1(b), often referred to as the "negative proviso", states that the provisions of the NGA granting authority to the FERC ". . . shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

It would indeed be even stranger to hold that Congress intended that FERC have authority to regulate the transportation of natural gas in interstate commerce but that —because exercise of that authority in a particular case might have some effect on rate and rate designs of local utilities—it did not intend that FERC would be able to approve the persons to whom interstate pipelines could deliver the gas without the consent of the States. Because the Court has so recently rejected such an "effect on rates" theory, National submits that this case is not sufficiently important to warrant review.

Another reason why this case is not sufficiently important to warrant review by this Court is that there is no conflict among the circuits. The D.C. Circuit reached the same conclusion as the Sixth Circuit below on the question of whether Panhandle's direct delivery of National's gas constituted the transportation of natural gas in interstate commerce" subject to jurisdiction of the FERC [6], and Respondent is aware of no decision of a Circuit Court which is in conflict with those decisions.

II. THE DECISION BELOW IS CONSISTENT WITH THE SCHEME OF REGULATION UNDER THE NGA, WHEREIN FERC REGULATES THE INTERSTATE TRANSPORTATION OF GAS AND STATES REGULATE THE LOCAL DISTRIBUTION OF GAS.

Michigan claims that the decision below violates the federal/state "dual regulatory scheme" under the NGA by finding that the transaction in question does not constitute the "local distribution" of natural gas by Panhandle to National. Michigan bases this claim on three arguments. First, Michigan asserts that although § 1(b) of the NGA gives FERC exclusive jurisdiction over the "transportation of natural gas in interstate commerce", it expressly reserves to the state's jurisdiction over "local distribution", the activity here is "local distribution", and the Sixth Circuit failed to articulate the difference

[6] Footnote 10, *supra*.

between "local distribution" and "transportation of natural gas in interstate commerce". Second, Michigan argues that prior to the NGA, states would have been able to regulate the activity in question and, by enacting the NGA, Congress did not intend to diminish the states' regulatory powers. Third, Michigan alleges that the result advanced by it is dictated by the *Panhandle/Michigan* case. Each of these arguments is misplaced.

A. The "Local Distribution" Argument.

The fundamental error throughout Michigan's argument is its *assumption* that Panhandle is engaging in "local distribution" merely by reason of its direct delivery to National of National's own gas, without analysis of what Congress meant by those words. Michigan fails to articulate the differences between "local distribution" and "transportation of natural gas in interstate comerce"; it simply advances the assertion, in dogmatic fashion, that if a pipeline delivers gas directly to an end user, it is engaged in "local distribution". The legislative history of Section 1(b) of the NGA, however, does not support that conclusion.

The Congressional intent regarding the "local distribution" language in the NGA is reflected in House Committee Report 709 [7] which contains an extensive discussion of the language which ultimately became § 1(b) of the NGA. The report states that the negative proviso language reserving certain areas of authority to the states merely reiterated the intent of Congress to withhold federal rate-setting jurisdiction over direct *sales* of natural gas:

> "In view of the importance of Section 1(b), which states the scope of the act, it seems advisable to comment on certain provisions appearing therein. It will

[7] H.R. Rep. No. 709, 75th Cong., 1st Sess. (1937). Report 1210 of the Senate Committee on Interstate Commerce, regarding H.R. 6586, merely adopted the House Committee Report 709.

be noted that this subsection of the bill, after affirmatively stating the matters to which the act is to apply contains a provision specifying what the act is not to apply to, as follows:

> 'but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or the facilities used for such distribution or to the production or gathering of natural gas.'

The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act the committee has included it in this bill. *That part of the negative declaration stating that the act shall not apply 'to the local distribution of natural gas' is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character.*" (H.R. Rep. No. 709, page 3, emphasis added)[8]

Based upon this legislative history, it is manifestly clear that the "local distribution" language in Sec. 1(b)

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[8] This court has recognized the significance of House Committee Report 709 in determining Congress' intent in enacting the NGA. For example in *Federal Power Comm. v. East Ohio Gas Co.*, 338 U.S. 464, 470, 94 L. Ed. 268, 70 S. Ct. 266, *reh'g denied*, 338 U.S. 905, 94 L. Ed. 1334, 70 S. Ct. 515 (1950), this court observed that ". . . the Committee Report [describes] the 'local distribution' provision as surplusage which was 'not actually necessary'." and in *Federal Power Comm. v. Louisiana Power & Light Co.*, 406 U.S. 621, 640, 32 L. Ed. 2d 369, 92 S. Ct. 1827 (1972), again relying on House Committee Report 709, this court held that the § 1(b) proviso language "was meant to apply exclusively to *rate-setting*, and in no wise limited to broad base of 'transportation' jurisdiction granted to the FPC."

of the NGA was intended by Congress to relate only to the federal/state division of jurisdiction between sales for resale and sales at retail, and the "local distribution" limitation meant only that the federal agency had no jurisdiction over sales at retail, "whether or not local in character". Interstate transportation plainly was not encompassed by the "local distribution" exemption.

In addition to the legislative history of § 1(b), the decisions of this Court make it clear that the activity involved in the Panhandle/National transaction constitutes the "transportation of natural gas in interstate commerce", subject to federal regulation. In *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 94 L. Ed. 268, 70 S. Ct. 266, *reh'g denied*, 338 U.S. 905, 94 L. Ed. 1334, 70 S. Ct. 515 (1950)[9] East Ohio Gas Co. operated pipeline facilities solely in Ohio and sold gas there directly to consumers through its local distribution system. The gas came into Ohio through interstate lines of other companies which connected with East Ohio's high pressure wholly intrastate pipeline. The Court found that East Ohio's facilities and activities up to the point where pressure of the gas was reduced upon injection into local mains were subject to federal jurisdiction under the NGA, notwithstanding the fact that those facilities were wholly within the State of Ohio and it made no sales of gas for resale. The Court rejected the argument that the word "transportation", as used in the NGA to define the scope of federal regulatory authority, applies only to facilities used for both transportation *and* sales for resale of natural gas, because the language of the Act simply did not support such an interpretation. The Court also found that the movement of gas in East Ohio's pipes

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[9] One reason why *East Ohio* is particularly well known regarding the scope of federal authority is that in 1954 the NGA was amended by the addition of the so-called "Hinshaw Amendment", Sec. 1(c), (which is not involved in this suit) for the purpose of limiting federal jurisdiction, in specific response to the Court's *East Ohio* decision.

was in interstate commerce, observing, "[t]hat this continuous flow of gas from other states to and through East Ohio's high pressure lines constitutes interstate transportation has been established by numerous previous decisions of this Court." (338 U.S. at 467.) The *East Ohio* decision cited, with approval, the above-quoted passage from the NGA's legislative history which limits "local distribution" to direct *sales* to consumers.

Having concluded that East Ohio came directly within the express provision granting power to the FPC to regulate "transportation of natural gas in interstate commerce", this Court held that federal jurisdiction is mandated and stated that "once a company is properly found to be a 'natural gas company', no state can interfere with federal regulation." (338 U.S. at 473.) Finally, this Court concluded that even if it might have been wiser for Congress to have created an exception to federal jurisdiction in the circumstances presented by East Ohio:

> ". . . we should not do so through the interpretative process. There is nothing in the legislative history which authorizes us to interpret away the plain congressional mandate." (338 U.S. at 474.)

This Court has also held that FERC has authority to regulate the interstate transportation of gas directly to an end-user even if a pipeline is making a retail sale which is not subject to FERC's rate regulation. For example, in the case of *Federal Power Commission v. Louisiana Power and Light Co.*, 406 U.S. 621, 32 L. Ed. 2d 369, 92 S. Ct. 1827 (1972), the question was whether, because of the shortage of natural gas, the FPC (FERC's predecessor) had jurisdiction to implement a curtailment program for United Gas Pipe Line with respect to both sales for resale *and* direct retail sales. Louisiana Power, a direct retail *sales* customer (thus a "local distribution" customer) of United challenged the application of the FPC's curtailment program to its gas purchase contract

with United claiming that the FPC had jurisdiction only over sales for resale, not retail sales. In holding that the FPC did indeed have jurisdiction over the curtailment of direct retail sales the Court first noted that the negative proviso in Sec. 1(b) of the NGA which states that federal jurisdiction does not apply to the "local distribution" of gas ". . . in no wise limited the broad base of 'transportation' jurisdiction granted the FPC." (406 U.S. at 640). In upholding the FPC's jurisdiction to curtail direct sales in interstate commerce, the Court stated:

> "Since curtailment programs fall within the FPC's responsibilities under the head of its 'transportation' jurisdiction, the Commission must possess broad powers to devise effective means to meet these responsibilities." (406 U.S. at 642)

Another case which illustrates how all-encompassing this court has construed the concept of interstate commerce in the movement of gas is *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 91 L. Ed. 1742, 67 S. Ct. 1482, *reh'g denied*, 332 U.S. 785, 92 L. Ed. 368, 68 S. Ct. 30 (1947), where the court held that gas which was sold and delivered to a pipeline inside Louisiana and *then* taken out of state was "in interstate commerce" even before the gas left the state. (331 U.S. at 667-668). The holding in *Interstate Natural* is significant because it makes clear that under the NGA gas purchased in one state commences its movement in interstate commerce prior to crossing a state line and, correspondingly, there is nothing in the NGA to suggest that interstate commerce ceases merely because the destination state line has been crossed and the gas is approaching the point of delivery. As long as the gas is in continuous movement it is being transported in interstate commerce, and FERC continues to have regulatory authority over the transaction through the point of delivery.

The implications of federal jurisdiction over *facilities* used in the transportation of natural gas in interstate

commerce are shown in *United Gas Pipe Line Co. v. Federal Power Commission*, 385 U.S. 83, 17 L. Ed. 2d 181, 87 S. Ct. 265 (1966). United, the purchaser, constructed a "short length of pipeline, a separator, a meter station and valves" to hook up to Continental, the seller. United obtained an FPC certificate of public convenience and necessity authorizing construction and operation of its new facilities and the transportation of the gas in the facilities from the point where it picked up the gas from Continental. Some time later, United refused to continue receiving gas from Continental. The Court upheld the FPC's determination that this constituted an abandonment of facilities and abandonment of a "service" to which Sec. 7(b) of the NGA (dealing with abandonments) applies. The Court, first noting that facilities certificated under Sec. 7(c) for the transportation of gas in interstate commerce are subject to the NGA Sec. 7(b) abandonment provisions, held:

> "*Thus, the 'facilities subject to the jurisdiction of the Commission' which are reached by the abandonment provisions of Sec. 7(b) are those facilities required for the interstate transportation of natural gas* and for the interstate sale of gas for resale to the ultimate consumer. Conversely, it would seem beyond argument that the proscription of abandoning 'any service' rendered by those facilities would include both transportation and sale, the twin functions which subject the facilities to the provisions of the Act." (385 U.S. at 86-87, emphasis added and footnote omitted)

United argued that the FPC could not order it to continue receiving gas from Continental because the FPC's jurisdiction over an abandoned "service" included only sales, and that United was *purchasing* and not *selling*. This court rejected United's contention and held that:

> "*The Act gives the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct matter, whether the transportation is for*

> *hire or for sale and whether the sale is for consumption or resale.* (Citations omitted). Here, of course, the transportation is not for hire but for sale, some for consumption and some for resale . . . the term 'service' is not confined to sales but extends to the 'movement of gas in interstate commerce' and that one who engages in *either* the sale *or* the transportation of gas is performing a service within the meaning of both Sections 7(e) and 7(b). It could not be more clear that United here abandoned a 'service' . . ." (386 U.S. at 89, emphasis in original).

The clear teaching of *United* is that transportation of natural gas in interstate commerce is a separate and distinct subject of the FERC's jurisdiction under the NGA *even when there is no sale, wholesale or retail, being made by the certificated pipeline.*

Michigan claims that the Sixth Circuit was in error because it failed ". . . to articulate the differences between the interstate transportation of natural gas and the local distribution of such gas." (Petition, pg. 8) Although the Sixth Circuit did not engage in a lengthy discourse on the subject, it did not need to do so. The Sixth Circuit found the D.C. Circuit's description of the Panhandle/National transaction so extremely appropriate that it simply quoted the D.C. Circuit's blunt observation that:

> "It is hardly conceivable that a transaction could fit more neatly into the category of 'transportation of ntaural gas in interstate commerce' ".

If both the D.C. Circuit and the Sixth Circuit found Michigan's characterization of the Panhandle/National transaction to be "hardly conceivable", it is no wonder that they did not discuss the subject at length, and they were certainly not in error for having failed to do so.[10]

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[10] On page 13 of its Petition, Michigan asserts that the D.C. Circuit and the Sixth Circuit failed to provide any "reasoned analysis" as to why the transaction did not constitute "local distribution". However, no more analysis of the subject is required than

Another reason why the Sixth Circuit found it unnecessary to discuss the subject at length is that it relied on the decision of the District Court which *did* deal with the issue in detail. Finding the District Court's analysis entirely adequate, the Sixth Circuit stated:

> "In this case, the appellants argue that FERC did not have jurisdiction over the Panhandle-National Steel bypass because it amounted to the 'local distribution if natural gas' . . . However, we agree with the district court, *National Steel Corp.*, 689 F. Supp., at 734-36 . . . that the Panhandle-National Steel bypass 'involves merely interstate transportation of natural gas' (which is subject to FERC jurisdiction) and not local distribution." Appendix 8a-9a.

A review of the opinion of the District Court below reveals that the distinction between "local distribution" and interstate transportation of gas under the NGA is discussed at length. (Appendix, 25a-32a)

B. "Pre-NGA" Caselaw.

Michigan erroneously claims that, prior to the NGA, it could have regulated the Panhandle/National transaction, and therefore, since Congress did not intend by the NGA to reduce the regulatory powers of states, the Sixth Circuit was in error for concluding that the NGA preempted Michigan's exercise of regulatory authority. Michigan is wrong in two critical respects. First, the cases Michigan cites in support of its argument [11] simply do not

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arriving at the threshold conclusion that the transaction is "transportation of natural gas in interstate commerce" which, under NGA § 1(b) is mutually exclusive from "local distribution". *See* pg 17, *infra.*, regarding the "bright line" separating state and federal jurisdiction.

[11] *Missouri v. Kansas Gas Co.*, 265 U.S. 298, 307-309, 68 L. Ed. 1027, 44 S. Ct. 544 (1924); *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U.S. 23, 30-31, 64 L. Ed. 434, 40 S. Ct. 279 (1920); *Public Utilities Comm. v. Landon*, 249 U.S. 236, 245-246, 63 L. Ed. 577, 39 S. Ct. 268 (1919), Michigan's petition, page 9.

support the proposition for which they are cited. Two of these cases involved the local *sale* of gas, not merely the interstate transportation of the customer's own gas, and the other involved sales at *wholesale*, which the Court held the state could *not* regulate. As the District Court below cogently observed with respect to pre-NGA cases:

> "There is no clear support for the proposition that a state ever had that power to regulate direct delivery of gas in interstate commerce—in the absence of a sale. The courts simply were never faced with the sort of transportation arrangement proposed here. To opine that state regulation of Panhandle's proposed transportation would have been deemed an acceptable burden upon interstate commerce would be pure speculation." *National Steel Corp. v. Long.*, 689 F. Supp. 729, 736 (W.D. Mich. 1988), Appendix, 34a.

In any event, *Congress* clearly understood that states could not regulate interstate transportation and it therefore enabled the federal agency to regulate that area.

Second, Michigan ignores the decisions of this Court which have held that by its precise language in drafting the NGA, Congress meant to draw a "bright line" between federal/state jurisdiction, making further analysis of commerce clause limitations on state authority unnecessary.[12] *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, L. Ed. 371, 62 S. Ct. 384 (1942); *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 76 L. Ed. 2d 1, 103 S. Ct. 1905 (1983); *Interstate Natural Gas v. Federal*

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[12] In *Southern California Edison, infra*, this Court held:

> "In short, our decisions have squarely rejected the view of the Court of Appeals that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. *Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis.*" (376 U.S. at 215-216, emphasis added).

Power Commission, supra, (1947); *Phillips Petroleum Co. v. State of Wisconsin,* 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794, *reh'g, denied,* 348 U.S. 851, 99 L. Ed. 670, 75 S. Ct. 17 (1954); *Federal Power Commission v. Southern California Edison Co.,* 376 U.S. 205, 11 L. Ed. 2d 638, 84 S. Ct. 644, *reh'g denied,* 377 U.S. 913, 12 L. Ed. 2d 183, 84 S. Ct. 1161 (1964). Therefore, while the pre-NGA cases are relevant in putting the subject in proper historical perspective, it is the language of the NGA which now controls.[13]

C. *Panhandle/Michigan.*

Throughout its Petition, Michigan relies heavily on *Panhandle/Michigan, supra,* which it claims is controlling of the outcome in this case. This reliance is misplaced, however, because in that case Panhandle proposed to *sell* gas to Ford Motor Company at the point of delivery of the gas to Ford, in Michigan. There was no question in that case but that the proposed activity was "local distribution", as contemplated by § 1(b) of the NGA. *Panhandle/Michigan* was not a preemption case, it was a burden on commerce case. The issue there was whether, notwithstanding the NGA § 1(b) proviso, Michigan could, without burdening commerce, impose *certificate* requirements as a precondition of Panhandle's sale of gas, thus potentially prohibiting the sale for want of a certificate as opposed to merely regulating the sale. Here, the transaction clearly involves the interstate transportation of gas, from receipt to redelivery, by a federally regulated interstate pipeline. No retail sale within the "local distribution" exception of § 1(b) occurs. Because there is no local sale taking place, and because all Panhandle is doing is picking up National's gas in one state and de-

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[13] As the District Court below summarized the point, "In fact, the § 1(b) bright line, 'clear and complete', 'easily ascertained', was specifically designed to obviate the need for such analysis.", citing *Southern California Edison, supra.*

livering National's gas to it in another state, both the D.C. Circuit and the Sixth Circuit found that it was ". . . hardly conceivable that a transaction could fit more neatly into the category of 'transportation of natural gas in interstate commerce' ". That being so, it is hardly conceivable that Michigan's "local distribution" argument warrants consideration by this court.

Another critical reason why this case is fundamentally different from the *Panhandle/Michigan* case is that here, the proposed direct service by Panhandle has been subject to *close regulatory scrutiny* by the FERC. Forty years ago, when Panhandle embarked on a marketing program to provide direct *sales* service to industrial customers in the midwest, Panhandle intended that the transactions would not be subject to any regulation at all.[14] That was found objectional by this Court and it refused to accept what Panhandle envisioned as an "attractive gap" in regulation.[15] In this case, Panhandle sought and obtained a certificate of public convenience and necessity from the FERC to provide the transportation service and construct the necessary facilities to make the direct delivery of the gas. The certificate was issued only after FERC had conducted a full contested case hearing, during which Michigan and MichCon had the opportunity to present witnesses and present argument as to why Panhandle's direct service to National was not in the public convenience and necessity. Thus, this Court need not be concerned that the public interest has not been taken into consideration. Quite to the contrary, FERC, the responsible administrative agency, has exhaustively reviewed all public interest issues relating to the provision of direct interstate transportation service to National.

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[14] *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 509 n.3, 92 L. Ed. 128, 68 S. Ct. 190 (1947).

[15] *Id.*, at 524.

III. THE SIXTH CIRCUIT'S ANALYSES OF THE PREEMPTION ISSUES WERE ENTIRELY CONSISTENT WITH § 1(b) OF THE NGA.

Having concluded that Congress did not expressly reserve to Michigan the authority to regulate the Panhandle/National transaction by reason of the "local distribution" proviso of § 1(b), the Sixth Circuit proceeded to decide whether Michigan could, notwithstanding, regulate the transaction based on the notion of dual federal/state jurisdiction envisioned by Congress when it enacted the NGA. The Court held, however, that the duality of regulatory authority under the NGA was intended to be *sequential*, not simultaneous, because otherwise conflicts would arise between the respective federal and state authorities. Therefore, the Court having concluded that Congress did not intend that there be federal and state regulation over the same transaction, the question became one of preemption. The Court first observed that because the NGA did not explicitly preempt state law in the case of direct pipeline deliveries, it would have to determine whether Congress implicitly indicated an intent to occupy the field in which Michigan intended to exercise regulatory authority. Citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 99 L. Ed. 2d 316, 108 S. Ct. 1145 (1988), the Court stated that preemption may be inferred:

> ". . . [1] where the pervasiveness of the federal regulation precludes supplementation by the States, [2] where the federal interest in the field is sufficiently dominant, or [3] where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." [citations omitted] Finally, even where Congress has not entirely displaced state regulation in a particular field, [4] state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found " 'when it is impossible to comply with both state and federal law, [citations omitted], or where the state law stands as an obstacle to the accomplish-

> ment of the full purposes and objetctives of Congress'. *Schneidewind, supra,* 108 S. Ct. at 1150-51." (Appendix, 10a)

The Court below then concluded that by a "meticulously drawn statement of federal jurisdiction" (Appendix, 11a) Congress intended to occupy the field in which Michigan intended to regulate. The Court also concluded that the MPSC's regulation of the National/Panhandle transaction "would obstruct the execution of the *complimentary* relationship between state and federal regulation" (Appendix, 11a), and would "permit the MPSC to cancel the FERC's approval" of the transaction.[16]

Michigan claims that the Sixth Circuit's preemption analysis was erroneous. The claimed error upon which Michigan focuses, however, remains the Court's conclusion that the Panhandle/National transaction does not constitute "local distribution". Michigan tries to buttress its argument here, however, by relying on the Court's recent decision in *Northwest Central Pipeline, supra.* Michigan notes that in *Northwest Central Pipeline* this Court was faced with a Kansas regulation aimed primarily at gas producers, and that the regulation was upheld [17] because the NGA § 1(b) proviso reserves to the states the jurisdiction to regulate the production and gathering of natural gas (in addition to "local distribution"). Michigan then poses the rhetorical question:

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[16] Although not a point expressly relied on by the Court below, MPSC certification of the transaction would also result in state regulation of Panhandle's interstate transportation *rates.* The Michigan statute in question, MCLA § 460.501 *et seq.*, provides in section 5 that "In determining the question of public convenience and necessity the commission *shall take into consideration* . . . the benefit, if any, to the public in *the matter of rates* and such other matters as shall be proper and equitable . . . ." (emphasis added)

[17] In *Northwest Central Pipeline,* FERC appeared as amicus curiae *in support* of the Kansas Corporation Commission and the validity of that state's regulation.

> "If, however, a single company performed both as a producer of gas in Kansas and as an interstate pipeline transporting that gas in interstate commerce, would the nature of that company's entire activities make its production activities any less subject to Kansas' regulation with respect to local production? Michigan thinks not." Petition, page 16.

Michigan then proceeds to draw the conclusion that the mere fact that Panhandle is an interstate pipeline transporting gas in interstate commerce should not divest Michigan of regulatory authority over the "local distribution" of gas merely because it is part of a larger transaction also involving the interstate transportation of gas.[18] The point that Michigan misses, however, is that the *entire* transaction here is the transportation of gas in interstate commerce—from beginning to end. There is no other aspect of the transaction that is even potentially the subject of state jurisdiction. The interstate transportation cannot be separated from the delivery because it is not complete until delivery is made. Interstate transportation can no more be separated from delivery of gas than it can be from receipt of the gas. Thus, there is no basis for applying the § 1(b) proviso.

Michigan also argues (Petition, pages 14-15) that *Northwest Central Pipeline*, *supra*, recognizes that a state law may impact matters within FERC's control without being preempted if the state's purpose is to regulate matters which are the subject of state jurisdiction. Although that general proposition may be true, it is wholly inapplicable to this case. In *Northwest Central Pipeline*, the pipelines unsuccessfully complained that the Kansas regulation, applicable only to producers, could affect purchasing deci-

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[18] Indeed, the authority for that proposition (which Michigan should have cited, but did not) is *Panhandle/Michigan*, where Panhandle's activity of *selling* gas locally was held subject to state regulation because of NGA § 1(b), notwithstanding the fact that it was part of a larger transaction involving the interstate transportation of the gas which was to be sold at retail.

sions of the pipelines, with a resulting impact on their cost structures and interstate rates. 103 L. Ed. 2d 529. The Court held that to find field preemption in such a circumstance would largely nullify the authority over production and gathering, which Congress expressly preserved to the states.[19] Here, the Court's finding of preemption was not because Michigan's exercise of authority would impact on areas of FERC responsibility while acting within areas (i.e., "local distribution") reserved to it under NGA § 1(b). Rather, the Court expressly found that Michigan was *not* acting within an area reserved to it (i.e., "local distribution"), and that preemption was applicable because Michigan was attempting to regulate within the area which the NGA assigned exclusively to the FERC—transportation of natural gas in interstate commerce.

Michigan also argues that § 1(b) is an "anti-preemption provision", and that the Sixth Circuit incorrectly concluded that the imminent possibility of a conflict between federal/state regulation necessitated a finding of preemption under *Schneidewind, supra.* Again, the obvious fallacy in Michigan's argument is that the so-called "anti-preemption provision" to which it refers is simply not applicable here because the transaction in question involves "transportation of natural gas in interstate commerce" and not "local distribution."

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[19] The Court in *Northwest Central Pipeline* distinguished two cases heavily relied on by the pipelines, *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U.S. 84, 9 L. Ed. 2d 601, 83 S. Ct. 646, *reh'g denied*, 372 U.S. 960, 10 L. Ed. 2d 14, 83 S. Ct. 1011 (1963) and *Transcontinental Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. 409, 88 L. Ed. 2d 732, 106 S. Ct. 709, *reh'g denied*, 475 U.S. 1091, 89 L. Ed. 2d 738, 106 S. Ct. 1485 (1986) which held that a state's "ratable-take order" directed at an interstate pipeline, requiring it to take gas from multiple suppliers in a single field, "invalidly invade[d] the federal agency's exclusive domain". Like those cases, in the name of protecting "local interests" the aim of the MPSC here is directly at the pipeline and its provision of interstate natural gas service, an area exclusively within the federal agency's domain.

Moreover, far from having a preemptive effect, the legislative history makes clear that the proviso was intended to be narrow in its effect and merely address "retail sales" by a pipeline, a matter which "could not be fairly said to be covered by the language affirmatively stating the jurisdiction of the Commission." See pg. 10, *supra.*

The only portion of Michigan's preemption argument which does not assume, as its predicate, that the transaction involves "local distribution" is the theory that no federal/state conflict *in fact* exists over Michigan's attempt to regulate the transportation of natural gas in interstate commerce in this case. Michigan's theory is that National has always been able to transport its gas from the producing state, through Panhandle's pipeline and *into MichCon's system* for redelivery to National's plant, and that the rates for such interstate transportation service remain fully subject to FERC regulation, unaffected by the state's actions. Therefore, if National were to continue transporting its gas in that fashion, there would be no problem. Put another way, Michigan's argument is simply that if FERC would require National and Panhandle to restructure their transaction as *Michigan* would like to require, no conflict would exist. This argument (for which Michigan cites no supporting authority) obviously misses the point. The fact is, it is the FERC which has responsibility for determining whether a particular set of facilities and a particular mode of effecting the interstate transportation of natural gas is in the public convenience and necessity under § 7(c) of the NGA. With respect to the specific Panhandle/National transaction in question, the FERC has explicitly made a finding that the direct delivery of National's gas by Panhandle to National's Michigan plant would be in the public convenience and necessity, as opposed to requiring the added step of requiring National to deliver its gas through MichCon's system. Obviously, Michigan disagrees with the FERC's decision, and that is precisely why there is an

imminent possibility of a conflict and why, under *Schneidewind*, preemption clearly exists.

FERC comprehensively regulates all aspects of Panhandle's transportation facilities, rates and services. If Michigan can tinker with facilities for interstate gas transportation or the terms of service, the range of potential conflicts would mount rapidly and the ability of FERC effectively to perform its regulatory responsibility over interstate transportation would be thoroughly undermined.

PRAYER FOR RELIEF

WHEREFORE, this Court should deny Michigan's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

RICHARD M. ZOMNIR
BABST, CALLAND, CLEMENTS AND ZOMNIR
2 Gateway Center
8th Floor East Wing
Pittsburgh, PA 15222
(412) 394-5400

WILLIAM PENNIMAN
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2404
(202) 383-0100

DOUGLAS H. WEST
(Counsel of Record)
JEAN G. SCHTOKAL
HILL LEWIS
100 Renaissance Center
32nd Floor
Detroit, MI 48243
(313) 259-3232
Attorneys for Respondent National Steel Corporation

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